IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.284 OF 2002

HASAN ALI SHAIKH,
Age : 35 yrs Occ:
R/at. Gokhivar and
Vanganpada Pelhar,
Tal. Vasai, Dist. Thane
(Thane Central Prison) ...Appellant.

V/s

THE STATE OF MAHARASHTRA ...Respondent.

Mr. Ganesh Gole, advocate for the appellant.

Mr. D.P. Adsule, APP for the respondent - State.

CORAM: V.M.KANADE,J.

DATE: 7th September, 2004.

ORAL JUDGMENT:

1. Appellant is challenging the judgment and Order passed by the Special Sessions Judge, N.D.P.S. Act, Thane whereby the appellant was convicted for an offence punishable under section 20(ii)(b) of N.D.P.S. Act and sentenced to suffer R.I. for five year and to pay fine of Rs 25,000/- and in default to suffer R.I. for six months and the accused was also convicted under section 66(1)(b) of the Bombay Prohibition Act and sentenced to suffer R.I for six months and to pay fine of Rs 1,000/- and in default to suffer R.I. for 15 days.

2. Prosecution's case, in brief, is that on 4/10/1999, the Complainant Mahadev Raghunath Shinde who was the Police Sub-Inspector attached to Nalasopara Police Station was on patrolling duty along with other constables and they were checking hotels and dhabas situated at Bombay-Ahmedabad Highway. When they went near Vanganpada locality, they noticed that one person was walking with two bags. When he was intercepted, he disclosed his name as Hasan Shaikh. When he was asked what was in the bags, he was frightened and started giving irrational and irrelevant answers. Therefore, two panchas were called and, in the presence of panchas, the bags were searched. In the bag which was held by him in the right hand, there was a packet containing 1 kg 40 grams opium and below that there were 12 Beer Bottles of Hayward. In other bag which was held by him in the left hand, there was a paper packet containing 520 grams ganja and below the said packet, there were 10 sealed Hayward Beer Bottles as well as four Officer Choice Whisky Bottles. The said articles were seized, panchanama was made and a complaint was filed. Samples were sent to Chemical Analyser and opium, ganja was detected in both the samples and ethyl alcohol was found in the bottles. Charge-sheet was filed.

3. Prosecution examined three witnesses i.e. Complainant Mahadeo Raghunath Shinde as P.W.1, Panch Witness Manoj Dinanath Yedwankar as P.W.2 and a Constable Sambhaji Vana Patil as P.W.3. The Trial Court, after perusing the evidence on record, came to the conclusion that in the case of a chance recovery provisions of Section 50 of the N.D.P.S. Act were not attracted. The Trial Court further held that the report which was submitted by the P.S.I. to the Superior Officer was brought on record at Exhibit-17 and, therefore, the provisions of section 57 of the N.D.P.S. Act were also followed. Prosecution has also relied on six photographs which revealed that there were four small packets in two big packets, in addition to Beer Bottles and Whisky Bottles. The Trial Court further came to the conclusion that the evidence of complainant has been corroborated not only by the Police Constable Sambhaji Patil - P.W.3 but also by an independent witness Manoj Yedwankar - P.W.2. The Trial Court convicted the accused under section 20(ii)(b) of the N.D.P.S. Act sentenced him to suffer R.I. for 5 years and to pay fine of Rs 25,000/- and in default to suffer R.I. for six month. The Trial Court also convicted the accused under section 66(1)(b) of the Bombay Prohibition Act and

sentenced him to suffer R.I. for six month and to pay fine of Rs 1000/- and in default to suffer R.I. for 15 days.

4. The accused is in jail since 4/10/1999 and by the time the present appeal reached final hearing, he has almost completed the sentence which was inflicted upon him by the Special Judge.

5. The learned Counsel appearing on behalf of the appellant has strenuously urged that the provisions of section 50 of the N.D.P.S. Act have not been followed and, as a result, there was a serious flaw in the prosecution's case. It is further submitted that the provisions of sections 41, 42, and 43 of the N.D.P.S. Act had not been complied with. He submitted that the learned Judge had accepted prosecution's case merely on the ground that it was a chance recovery and therefore it was not necessary to take recourse to the provisions of section 50 of the N.D.P.S. Act. It is submitted that the photographs on which the reliance was placed by the prosecution were signed by the J.M.F.C., ought to have been discarded in view of the fact that the J.M.F.C. Vasai, who had signed the photographs could not have become a witness. It is further submitted that so far as P.W. 2 Manoj

Dinanath Yedwankar is concerned, he was merely a rickshaw driver and, therefore, there was every possibility that he had acted as per the directions of the Police. The Trial Court, therefore, ought to have discarded the said evidence. He further submitted that so far as Chemical Analyser's report is concerned, it indicated that both the samples contained ganja and opium and, therefore, the finding of the Trial Court regarding possession of opium was uncalled for.

6. The learned Counsel appearing on behalf of the prosecution vehemently opposed the said submission. He submitted that the Trial Court has given cogent reasons in convicting the accused. He submitted that the question of compliance of section 50 of the N.D.P.S. Act did not arise as it was a chance recovery. He submitted that the Trial Court had convicted and sentenced the appellant for a period of five years since the quantity was less than commercial quantity. He submitted that, therefore, the conviction ought to be confirmed.

7. In my view, submissions made by the learned Counsel appearing on behalf of the appellant cannot be accepted. In the present case, evidence of three

witnesses is sufficient to prove the prosecution's case. The Apex Court has repeatedly held that the quality of evidence is essential and not the volume. In the present case, complainant was on patrolling duty. He noticed that the accused was travelling in suspicious circumstances. He was accosted and searched in the presence of the panch. The contraband was found in the bags which he was carrying. The contraband was sent to the Chemical Analyser who has given his opinion that ganja was detected in both the samples which falls under section 2(iii)(b) of the N.D.P.S. Act, 1985. In my view, the evidence of the complainant is corroborated by the Constable as also by an independent witness. Merely because he is a rickshaw driver, it cannot be said that he has given evidence at the instance of the Police. His evidence, therefore, on that ground cannot be discarded. The quantity which was found in possession of the accused was more than small quantity and less than commercial quantity. The Trial Court has, therefore, convicted the accused under section 20(ii)(b) of the N.D.P.S. Act and sentenced him to suffer R.I. for five years and to pay fine of Rs 25,000/- and in default to suffer six months' R.I. It appears that the accused is in jail since 4/10/1999 and he has practically completed the sentence of five years. The conviction,

therefore, is confirmed. However, if the accused has not paid the fine, he will suffer further R.I. for a period of two months instead of six months.

8. In the result, following order is passed:-

O R D E R

. The conviction is confirmed. However, if the accused has not paid the fine, he will suffer further R.I. for a period of two months instead of six months. With this modification conviction is confirmed. Appeal is partly allowed in the above terms.

V.M. KANADE, J.